NUMBER: 87-1317

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

STATE OF LOUISIANA ex rel.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,

PETITIONERS

v.

THE UNITED STATES OF AMERICA
THE SECRETARY OF THE INTERIOR
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does Section 8(g)(3) of the Outer Continental Shelf Lands Act, as amended in 1986, require the Secretary of the Interior to enter into unitization or other royalty sharing agreements in order to compensate affected coastal States for their drainage losses?

2. Did Congress intend to provide compensation to affected coastal States for resource drainage by federal lessees on the OCS by the revenue sharing payments made to the affected coastal States under Section 8(g)(2) of the OCSLA?

3. Did Congress provide statutory consequences for a failure of the Secretary of the Interior to enter into a unitization or other royalty sharing agreement with a coastal State under Section 8(g)(3)?

4. Did Congress intend to eliminate litigation over the sharing of OCS revenues under Section 8(g)?

LIST OF PARTIES

The parent company of Samedan Oil Corporation is Noble Affiliates, Inc.

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STATEMENT OF THE CASE

Introduction

By this litigation, the State of Louisiana and its mineral lessees of submerged lands adjacent to Block 18 of the West Delta Area of the Outer Continental Shelf seek to compel the Secretary of the Interior to enter into a unitization agreement under Section 8(g)(3) of the Outer Continental Shelf Lands Act ("OCSLA"). Essentially, the State of Louisiana and its mineral lessees object to the lawful operation of the rule of capture insofar as it may benefit the Federal government and its mineral lessees operating on Block 18 of the West Delta Area within the domain of the United States on the Outer Continental Shelf. Thus, to eliminate their alleged drainage losses, these petitioners hope to convince this Honorable Court that the Secretary of the Interior has a statutory duty to enter into unitization agreements with the State whenever and as soon as it is determined that a common reservoir may underlie both the state and federal domains. No such duty exists, nor was production sharing through forced unitization with the coastal States the intended Congressional remedy for drainage of mineral resources from state lands by federal operations on the Outer Continental Shelf.

Through Section 8(g) of the OCSLA, Congress expressed its policy regarding the coastal States' remedy for resource drainage by federal lessees on the OCS - that remedy being limited to participation by the coastal States in revenues generated by federal leases within the 8(g) zone. With careful regard for and proper observance of the principles of statutory construction laid down by this Court and with due consideration to the legislative history affecting not only the 1986 amendments to the OCSLA but also the original 8(g) revenue sharing plan implemented by Congress in 1978 to address the drainage issue, the United States District Court for the

Western District of Louisiana[1] and the United ~~States~~ Court of Appeals for the Fifth Circuit[2] have rejected petitioners' suggestion of an alleged "duty to unitize" under the 1986 amendments of the-OCSLA.

Respondent submits that an examination of the statutory analysis performed by the Fifth Circuit Court of Appeals will readily disclose that no analytical conflict exists between the Fifth Circuit and the First and Tenth Circuits as suggested by the petitioners herein. Moreover, the decisions of the lower courts do nothing to disturb the historical practice of unitization between the sovereigns along the federal-state boundary of the Outer Continental Shelf. Respondent accordingly submits that the decision of the Fifth Circuit Court of Appeals in this matter is correct and does not raise questions that merit review by this Honorable Court.

HISTORY OF THE CASE

For purposes of this opposition brief, respondent adopts by reference the statement of facts contained in the decisions of the courts below.

In connection therewith, it is appropriate to observe that following the institution of this litigation, the Department of the Interior (acting through the Minerals Management Service) concluded a fact-finding process to determine whether the reservoirs involved in this litigation are common and competitive and on May 1, 1987 issued its final determination, concluding that two of the three reservoirs described in Louisiana's complaint are non-competitive with the reservoirs encountered in the Samedan OCS wells and that the remaining reservoir produced by the state lessees was competitive

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1 The opinion of the District Court is reported at 656 F. Supp. 1310 (W.D. La. 1986).

2 The opinion of the Fifth Circuit is reported at 832 F. 2d 935 (5th Cir. 1987).

with the reservoir produced by Samedan from its federal lease. The Department of the Interior also concluded that no unnecessary drilling or waste of oil and gas had occurred, or would occur, as a result of operations conducted by Samedan and further determined that unitization of the subject reservoirs was not necessary for the conservation of the natural resources of the OCS. The District Court in this litigation also found absolutely no evidence that Samedan's operations are themselves wasteful, a finding affirmed by the Fifth Circuit Court of Appeals which stated:

> "Assuming that Louisiana or the state lessees would have a cause of action against the Director or Samedan because of waste, this record raises no issue to support such a claim. The closest Louisiana got to this issue was expert testimony given during the hearing on the state's motion for a preliminary injunction that coordinated exploration might enhance the amount of hydrocarbons ultimately recovered. Against that suggestion was detailed proof by Samedan of prudent operations in accord with federal regulations and under substantial oversight by the MMS. We find no evidence of waste in the record and affirm the summary judgment."

ARGUMENT

Prior to analyzing the contentions of error in the decisions of the lower courts suggested by petitioners, a brief examination of the Congressional goals underlying enactment of the OCSLA and the incorporation of the drainage compensation remedy under Section 8(g) is appropriate.

Congressional Goals Underlying Enactment of the OCSLA and its Amendments

The Outer Continental Shelf Lands Act of 1953 amended the Submerged Lands Act in order that the area of the Outer Continental Shelf beyond the boundaries of the states could be leased and developed by the federal government. The Act was a legislative confirmation of the jurisdiction of the United States over the natural resources of the subsoil and sea bed of the Outer Continental Shelf

outside state boundaries and made federal law applicable to that area. Under the OCSLA, the Secretary of the Interior has exclusive conservation jurisdiction over federal lands of the Outer Continental Shelf and has declared that OCS orders implementing his conservation jurisdiction over lease operations of every kind, including rates of production, on federal oil and gas leases on such lands comprise the exclusive rules and procedures governing the development of such leases.[3] Accordingly, conservation regulations of the State of Louisiana have no application to federal OCS development.[4]

By the early 1970's, public awareness of the environmental hazards associated with OCS development and the Arab Oil Embargo of 1973 underscored the need for restructuring the statutory and regulatory framework affecting OCS leasing to both foster expedited development and provide greater protection against environmental hazards.

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3 See the December 4, 1970 notice by the Secretary of the Interior published in the Federal Register on December 5, 1970, appearing at 35 Fed. Reg. 18559

4 See also *Kirkpatrick Oil & Gas Company v. United States*, 675 F. 2d 1122 (10th Cir. 1982) which affirmed that no state-ordered force pooling can bind the federal government without the consent of the Secretary of the Interior. Noted the Court: "If compulsory state pooling orders were applied to federally owned lands over the Secretary's objection, a State could impose acreage requirements and unit boundaries that conflict with the Secretary's judgment of the best standards for conservation purposes." (Emphasis ours) A contrary result, noted the Court, would interfere with the Secretary's control over its own lessees and lease provisions requiring, for example, the lessee to drill in different production zones or to produce at particular rates.

Thus, one of the primary Congressional purposes for the 1978 amendments to the OCSLA, including the incorporation of Section 8(g), was the establishment of "policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." See 43 U.S.C. § 1332 and 1802. Accord: *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S.Ct. 205 at 209 n.2, 70 L.Ed.2d 309 (1981). Another objective was to abate federal-state dissonance arising out of the adverse environmental and economic impacts of OCS development on the coastal States, which had commonly resorted to litigation as a means for delaying OCS development.[5]

In Section 8(g), Congress specifically addressed the problems associated with the existence of a common border separating federal and state offshore property, including particularly the problem of drainage.

As enacted in 1978, Section 8(g) created a zone comprising an area of federal offshore lands lying within three miles of the seaward boundaries of the coastal States. Within this zone the Secretary of the Department of the Interior, in consultation with the Governor of the affected coastal State, would determine at the time the Secretary solicits nominations for lease bids on tracts within this zone, whether the area may contain one or more oil or gas pools or fields underlying both the Outer Continental Shelf and lands subject to the jurisdiction of the state. If such tracts were identified, the Secretary was required to offer the Governor of the coastal State the opportunity "to enter into an agreement concerning the disposition of revenues which

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5 For a good summary of the history and experience on federal development of the Outer continental Shelf, see *State of Texas v. Secretary of the Interior*, 580 F. Supp. 1197 (E.D. Tx. 1984).

which may be generated by a federal lease within such area in order to permit their fair and equitable division between the State and Federal Government." See former 43 U.S.C. § 1337 (g)(2). If the parties could not agree regarding the disposition of revenues from such lease, the Secretary could nonetheless proceed with the leasing; however, under Section 1337 (g)(4), he was required to deposit into a separate account all bonuses, royalties and other revenues attributable to oil and gas pools underlying both the Outer Continental Shelf and submerged lands subject to the jurisdiction of the coastal State until such time as an agreement was reached or, failing same, as a district court of the United States determined the fair and equitable disposition of such revenues, as well as any accrued interest, and the proper rate of payments to be deposited into the treasuries of the Federal Government and such coastal State.

Under the clear and unambiguous language of the statute, compensation to the affected coastal State for drainage was limited to a fair and equitable division of the revenues generated by the federal lease(s) affecting the common reservoir. Moreover, the State gained the advantage of such compensation by the mere identification of a potential common pool or field, even though there was no definitive determination that such common geological structure existed. Had Congress intended to resolve the drainage problem by requiring a sharing/allocation of production by unitization or by restricting production allowables between the competing state and federal tracts, it could easily have done so by an express textual requirement. But Congress made no such requirement.

One obvious reason for excluding such requirement was to preserve to the Secretary the discretion and flexibility necessary to accomplish an expeditious and orderly development of the federal resources under the Outer Continental Shelf, utilizing unitization only

when he deemed it appropriate for proper development of the leases.[6] In this regard it is also to be observed that under the federal regulations, even as between competing federal lessees on the Outer Continental Shelf, unitization (whether voluntary or compulsory) may not be required or approved by the Director of the MMS until he finds that the delineation of any reservoir or any potential hydrocarbon accumulation has been reasonably established. See 30 C.F.R. § 250.50(c).

Moreover, a provision mandating the confection of a unitization agreement between the state and federal authorities to resolve the drainage problem would unquestionably frustrate the statutory goal of promoting expedited exploration and development of the Outer Continental Shelf to achieve national economic and energy objectives by allowing an affected coastal State the opportunity, by merely withholding cooperation, to delay or prevent the exploration and development of federal tracts in the 8(g) zone. Further frustration of Congressional purpose would result from the probability that, in the absence of agreement between the state and federal authorities over reservoir limits, control over production allowables on wells producing in the competitive reservoir, etc., the State would pursue oft-resorted to litigation (and the delays inherent therein) to require the federal courts to function as a superior or ultimate regulatory authority and weigh the myriad geological, engineering and other technical data in order to force-unitize such reservoirs so as to comply with such a statutory requirement.

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6 Compare *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S.Ct. 205 at 213 70 L.Ed. 2d 309 (1981): "If Congress meant to restrain the Secretary of the Interior's discretion in experimenting with the various alternative bidding systems, we can expect the statute to reflect that intent. But it does not...Most significantly Congress left 'to the discretion of the Secretary.' § 1337 (a) (1), the cnoice among the various nontraditional alternatives, evidently leaving to his expert administrative determination the complex, technical problem of deciding which alternative bidding systems are more likely to further the statute's objectives."

Such considerations prompted Congressional rejection of early versions of the 1978 OCSLA amendments which included a joint leasing system that required joint federal-state leasing of tracts located within the 8(g) zone.[7]

Through Section 8(g), Congress specifically declared its policy regarding the remedy to affected coastal States for drainage of mineral resources from state lands by federal lessees on the Outer Continental Shelf. That remedy is limited to a participation by the affected coastal State in the federal lease revenues derived from federal OCS tracts within the 8(g) zone affected by a potentially common reservoir. Such revenue sharing was intended to compensate these states not only for the effects of drainage but also for related inequities fostered by the juxtaposition of ownership interests at the state-federal border.

In *State of Texas vs. Secretary of the Interior, et al,* 580 F.Supp. 1197 (E.D. Tx. 1984), the United States District Court for the Eastern District of Texas stated that in determining the "fair and equitable" division of the federal lease revenues required by Section 8(g) as enacted in 1978, a court should examine and weigh the totality of the circumstances, with the proper division of revenue based not simply upon a consideration of the proportionate surface area of the reservoir underlying the federal-state domains, but also upon consideration of the economic benefits accruing to the federal government as a result of information generated by prior activity on the state side of the border and development incentives benefiting the federal government as a result of royalty rate disparity between federal and state leases affecting the potential common reservoir, among other factors. Several important conclusions by the court regarding the scope and purpose of Section 8(g) should be noted:

(1) The court observed that a consideration of the purposes of Section 8(g)(4) (as enacted in 1978) leads to the conclusion

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7 See in this regard, H.R. Rep. No. 590, 95th Congress, 2d Sess. 219, 220 (1978) reprinted in 1978 U.S. Code Cong. & Adm. News at 1625.

that a suit for a fair and equitable division of 8(g) lease revenue is an exclusive remedy, a result which the court notes is "consistent with the Congressional purpose of alleviating litigation - related delay of OCS development". See 580 F. Supp. 1197 at 1207, note 46.

(2) The court recognized as a specific limitation on the standard by which a "fair and equitable" disposition is based, the statutory limitation that only lease revenue attributable to tracts located in the 8 (g) zone are subject to division. Id. at Page 1219, note 86.

(3) The court aptly observed:

"As the Supreme Court has noted, courts perform their constitutional duty by "construing the language Congress has employed. In so doing, ...[courts must] take statutes as ...they find them, guided, if ambiguity appears, by the legislative history and statutory purpose." *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 2211, 65 L.Ed.2d 144 (1980)." Id. at Page 1218.

Disputes between the Secretary and the Governors of coastal States over the scope of the revenue entitlement under Section 8(g) and the proper allocation of these revenues resulted in failure to effect the revenue sharing agreements required by the statute, the escrow of substantial sums in 8(g) revenues to be divided between the sovereigns and, of course, litigation to accomplish the proper revenue division. In 1986 Congress amended the OCSLA to permanently resolve the disputes over OCS revenues and to release the impounded funds.

The 1986 amendments to Section 8(g) of the Outer Continental Shelf Lands Act were adopted under the Consolidated Omnibus Budget Reconciliation Act of 1985. The amendments contain a funding provision at Section (8)(g)(2) which commits to affected coastal States and their local governments revenues for use in mitigating the adverse economic and environmental effects of development of the mineral resources of the Outer Continental Shelf adjacent to state lands. Under the amendment, 27% of the bonuses, rents, royalties and other revenues derived from federal leases issued after September 18, 1978 covering any federal tract situated within

the 8(g) zone (including tracts containing common potentially hydrocarbon-bearing areas as to which drainage might occur) is to be paid by the Secretary to such coastal State. The amendment thus perpetuated the former Congressional policy regarding compensation to these states for drainage of state resources by federal lessees operating on the Outer Continental Shelf.

Despite the permissive language of Section 8(g)(3) of the 1986 amendments, petitioners suggest that this section mandates the Secretary to enter into a unitization or other royalty sharing agreement to protect the State from drainage losses. More specifically, they argue that Congress has codified the "historical practice" of unitization in such situations. Briefly consider what petitioners have referred to in this litigation as "the historical arrangements that have served so well to protect both sovereigns against the inequitable effects of drainage."[8]

The Historical Practice of Unitization

According to the district court testimony of Bobby Jones, the former chief geologist for the Louisiana State Mineral Board and acting Assistant Secretary who, according to petitioners, "is intimately acquainted with State-Federal unitization agreements," this historical arrangement has been <u>wholly voluntary unitization</u> between the sovereigns and their lessees (in the majority of the cases there existing only a common lessee between the sovereigns), failing which the sovereigns pursued offset drilling or other means to protect their interests from drainage.[9] Moreover, Mr. Jones indicated that the normal practice has been to consider unitization only when a well has been completed on both sides of the federal-state boundary and was producing from the same reservoir.[10] Voluntary unitization, of course, requires the complete accord of all parties regarding the

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8 Vol. 4, Record at page 692.

9 Vol. 11, Record at 110-112 and 153-156.

10 Vol. 11, Record at pages 136-137.

productive limits of the common reservoir, the appropriate sharing formula, the proper and efficient rates of production from unitized wells and the designation of a unit operator, among other considerations. The authority of the Secretary of the Interior to enter into such voluntary unitization agreements did not proceed from any statutory mandate to employ unitization at all times and in all cases as the means of countering the effects of drainage across the state-federal OCS border nor did it proceed from any Congressional intent or expectation that he always agree to unitize in such circumstances. Had such been the Congressional intent or statutory duty, then it would have been illogical for Congress in 1978 to fashion the Section 8(g) revenue sharing remedy to the coastal States designed primarily to alleviate the economic effects of drainage of mineral resources underlying State submerged lands by federal wells on the Outer Continental Shelf.

Historically, as now, unitization efforts by the Secretary affecting common pools across the federal-state OCS border are appropriate only when necessary for the prevention of waste and the conservation of the natural resources of the federal domain of the Outer Continental Shelf.[11] Thus the Preamble to 30 CFR 250.50, 250.51 and 250.52, Unitization; and Pooling, and Drilling Agreements,[12] which addresses the final rule of the Department of the Interior incorporating the modifications to Sections 250.50, 250.51, and 250.52 of Chapter II of Title 30 of the Code of Federal Regulations required to implement the Department of the Interior's responsiblity to assure prompt and efficient exploration and development of leased areas and to issue regulations "for unitization, pooling and drilling agreements (43 USC 1334)" provides:

> Subsection 250.50(a) sets forth the basic authorization for unitization, which is the conservation of the natural resources of

11 See Section 5 of the OCSLA at 43 U.S.C. § 1334.

12 See Preamble to 30 C.F.R. § 250.50, 250.51 and 250.52 at 45 Fed. Reg. 29280 (1980), hereinafter cited as "Preamble".

the OCS. ...Under § 250.51-2(b), compulsory unitization, like voluntary unitization, must conform to the criteria of § 250.50. (Emphasis added)

30 CFR § 250.50 provides in pertinent part:

(a) Unitization may be required or approved by the Director for the prevention of waste and the conservation of the natural resources of the OCS, and for the protection of correlative rights therein, including the protection of Federal royalty interests. (Emphasis ours)

* * *

(c) Unitization may not be required or approved by the Director until he finds that the delineation of any reservoir or any potential hydrocarbon accumulation has been reasonably established.[13]

Furthermore, that the OCSLA and unitization regulations of the Code of Federal Regulations do not embrace the notion of any mandatory duty in the Secretary to unitize common reservoirs across the federal-state OCS boundary is particularly reflected in the following statement in the aforementioned Preamble:

Provide for Unitized Operation of Less than an Entire Reservoir. One respondent recommended that the proposed rule be clarified to permit unitized operation of a portion of a reservoir. Generally, unitization should encompass an entire reservoir, or for exploration purposes, a geological structure expected to evidence the possible presence of a potential hydrocarbon accumulation. However, there may be unusual situations, for example, near a Federal/State boundary, near a marine sanctuary, or near some natural feature where unitization of a portion of a reservoir or potential hydrocarbon accummulation would be appropriate. Accordingly, this suggestion has been adopted.

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13 Since the pursuit of a revenue sharing agreement under Section 8(g)(3) is possible upon simple identification of a common potentially hydrocarbon bearing area underlying the federal-state boundary even though definitive reservoir limits are not yet reasonably determinable, unitization would never be an appropriate mechanism to accomplish the purposes of Section 8(g)(3) in most instances when geophysical or early drilling data permit identification of potential common areas.

> However, it should be noted that it is not the Department's intent to authorize or to require that an area be developed and produced under a unit agreement when the objectives that would be obtained through unitization are being or can be obtained without a unit agreement. (Emphasis added)

Aware of the historical arrangement permitting the possibility for voluntary unitization to eliminate the adverse effects of drainage across the federal-state OCS border, Congress in 1978 fashioned in Section 8(g) a remedy to the coastal States for the adverse effects of drainage which was completely devoid of any reference to or preference for unitization, whether voluntary or compulsory, as the means of protecting the states' interests. As previously indicated, the clear Congressional purpose behind the Section 8(g) remedy in the 1978 amendments to the OCSLA was to eliminate any opportunity for delay in OCS leasing which could result from any requirement for joint federal-state action and which would impair the primary objective of expedited exploration and development of the federal Outer Continental Shelf. Thus the scheme for joint leasing by state and federal authorities of tracts within the 8(g) zone affecting a potential common pool was eliminated. Requiring a unitization agreement by both sovereigns (and their mineral lessees) as a prerequisite to the development and production of federal OCS tracts within the 8(g) zone affected by a common pool would obviously violate the same Congressional purpose. In fact, that Congress never intended unitization to be the mandated remedy to the drainage problem along the federal-state OCS border under the 1986 amendments is apparent from the Congressional rejection of the Alaska forced unitization proposal.[14]

It should also be observed that the suggested "duty to unitize" would not only frustrate Congressional purposes but would create an impractical, unworkable approach to the drainage problem. A "duty

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14 See footnote 15 of the opinion of the Fifth Circuit in this litigation at 832 F. 2d 935 at 942.

to unitize" suggests by implication that all parties must somehow agree on all matters affecting the unitized operation which, as demonstrated by the significant differences in geological and engineering opinion embraced by the parties in this litigation, will not always occur.[15] Since Congress has created no superior regulatory agency or other authority to resolve such inter-sovereign disputes, the approach suggested by petitioners would throw upon the federal courts the burden of resolving these technical disputes and other differences of opinion on the unitized operation without the benefit of any assistance by a staff of technical advisors (as is utilized by the MMS and by the Commissioner of Conservation of the State of Louisiana in the resolution of such problems), a burden clearly beyond the proper functioning of the federal judiciary and obviously outside the Congressional purposes of the OCSLA. Moreover, the obvious and consequential need for resort to the courts to resolve differences of opinion on unitization and the unitized operation of federal OCS lands affected by potential common reservoirs with the State of Louisiana is unquestionably contrary to the clear Congressional purpose behind the 1978 amendments to the OCSLA of avoiding litigation-related delays in the development of federal resources of the Outer Continental Shelf.

Thus, the historical and present role of unitization along the federal-state border of the OCS reflects the practical wisdom of Congress--that unless necessary for the prevention of waste or conservation of the natural resources underlying the federal domain of the outer Continental Shelf, unitization across the federal-state

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15 A unitization agreement will normally fix reservoir limits, define the unitized horizons, allocate production and costs to the various unitized tracts, designate the unit operator, establish rates of production between wells, provide for expansion or reduction of the unit area as may be required and for a recomputation of equities in the event new data recovered in subsequent drilling dictates a change in unit configuration, provide for an operating agreement to regulate the rights of the parties on subsequent unit operations, among other terms.

OCS border for the exclusive purpose of offsetting possible drainage from state submerged lands is only appropriate when the sovereigns and their respective lessees can voluntarily agree on all matters affecting the unitized operation, failing which each sovereign remains free to protect against the effects of drainage by drilling or other means, and the affected coastal State remains protected against the adverse economic effects of drainage by its revenue sharing entitlement under Section 8(g) of the OCSLA.

We now address the specific issues which petitioners have raised for review by this Court.

The Alleged "Duty" Under Section 8(g)(3)

Section 8(g)(3) of the 1986 amendments provides that the Secretary or the Governor of a coastal State shall notify the other if either determines that a common potentially hydrocarbon-bearing area may underlie the federal and state boundary and that the Secretary shall provide to the Governor notice of the current and projected status of the tracts in the area. It additionally provides that if the Secretary has leased or intends to lease the area, the Secretary and the Governor may enter into an agreement to divide the revenues from production from the common potentially hydrocarbon-bearing area, pursuant to existing law. If no agreement is reached, the Secretary may proceed with the leasing of the area. If an agreement is reached, the revenue received by the Federal government is subject to the 27%-73% division set forth in Section 8(g)(2).

Unlike the original 8(g) legislation adopted in 1978 which required (by use of the word "shall") the Secretary to offer the Governor of the affected coastal State the opportunity to enter into a revenue sharing agreement as to tracts within the 8(g) zone affected by a potential common pool, under the 1986 amendments, Congress left the decision of whether or not to enter into a revenue sharing agreement under Section 8(g)(3) to the unfettered discretion of the Secretary. Note that the statutory language does not create an obligation to enter into an agreement and then authorize the Secretary

to use his discretion in deciding the type and form of agreement to be used. Rather the statute is clearly permissive as to the very act of entering into such an agreement.

Petitioners allege that by ruling that "may" was purely permissive as used in this statute, both the Fifth Circuit and the District Court evaded a thorough examination of the statutory context and legislative history of Section 8(g)(3), permitting a result which defies the Congressional will. Petitioners further suggest that the lower courts violated the canons of statutory construction that legal effect must be given to all parts of a statute and that a statute must be interpreted to avoid absurd results. Review of the lower court decisions demonstrates these contentions to be wholly unfounded.

In finding that the Secretary of the Interior has no duty under Section 8(g)(3) to enter into a unitization or royalty sharing agreement to compensate states for drainage losses, the District Court gave careful scrutiny to the canons of statutory interpretation in its analysis, noting that its starting point is the plain meaning of the statutory language. Although observing that if necessary, recourse to legislative history is appropriate, the Court's consideration of the legislative commentary was with appropriate deference to the significance of the statutory language. Commented the Court:

> "Undoubtedly, the passage of the 1986 OCSLA amendments was engendered by different, and perhaps inconsistent, legislative motives. That history does not give the court license to impose its own policy choice. While we are not confined to the statutory language, we are confined by it, and a presumption exists that the legislature intended the plain meaning of its words. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 543-44 (1947)."

The Court thus observed:

> "The plaintiffs' position ignores the permissive nature of the revenue sharing authority established in § 8(g)(3). Although the notification requirements of § 8(g)(3) are cast in mandatory language, the text preceding the revenue sharing provision is clearly permissive. This language invests the Secretary with discretion to enter into agreements pursuant to § 8(g)(3). See

generally *Knight Newspapers, Inc v. United States*, 395 F. 2d 353, 357-58 (6th Cir. 1968)."

Moreover, the District Court found that characterization of Section 8(g)(3) revenue sharing agreements as discretionary is consistent with the section's restriction of agreements to those formed "pursuant to existing law". Stated the court:

> "Existing law permits the Secretary to enter into unitization agreements to protect federal royalty interests and prevent waste of natural resources. It is not unreasonable to interpret § 8(g)(3) as preserving the Secretary's license to enter into voluntary agreements with the states. The Secretary would have discretion to negotiate such an agreement when advantageous to federal interests."

This conclusion was also confirmed by analysis of the overall structure of the 1986 amendments and their legislative history and by comparison to the structure of pre-amendment Section 8(g). Observed the District Court:

> "Moreover, a comparison to pre-amendment § 8(g) gives credance to the view that drainage compensation is incorporated in § 8(g)(2)scheme. The former version of § 8(g), enacted in 1978, provided that the existence of a common reservoir triggered a duty 'to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the state and federal government.' 43 U.S.C. § 1337(g)(2), amended by § 8002-8004 of the Consolidated Omnibus Budget Reconciliation Act, Pub. L. 99-272, 100 Stat. 147, 148 (1986) [hereinafter, 'former { 8(g)']. If the parties could not agree on a 'fair and equitable' division, the Secretary was empowered to proceed with leasing. However, former § 8(g)(4) required that all revenues be retained in a separate account until agreement was reached or the issue resolved by a U.S. District Court.
>
> Because the 1986 amendments preserved the Secretary's express authority to proceed with leasing in the absence of any agreement, the failure to carry the escrow provision over into the current § 8(g)(3) indicates that agreement on revenue sharing is now entirely discretionary. This is consistent with the view that the substitution of the 27%-73% split now mandated in §

8(g)(2) for the 'fair and equitable' standard was designed to incorporate drainage compensation.

One of the stated policies of the OCSLA is to make the OCS available 'for expeditious and orderly development.' 43 U.S.C. § 1332(3). The legislative history of the 1986 amendments indicates that a major goal of Congress was to avoid protracted litigation over the meaning of 'fair and equitable.' This purpose is inconsistent with plaintiffs' position concerning the meaning of § 8(g)(3). Congressional substitution of the 27%-73% division for the 'fair and equitable' standard could not be perceived to avoid litigation if drainage was to be compensated separately.

I recognize that my analysis is predicated on the understanding that the 'fair and equitable' standard incorporated drainage losses. Despite plaintiffs' contrary position, I am confident that the history and interpretation of the OCSLA confirm that reliance. The legislative history of the 1978 OCSLA amendments clearly indicates that former § 8(g) was intended to address drainage concerns."

The Court continued:

"Presumably, the terms of any voluntary § 8(g)(3) revenue sharing across the State/Federal boundary would compensate for drainage losses. Because I interpret the division mandated by § 8(g)(2) to incorporate drainage compensation, it might appear that voluntary § 8(g)(3) revenue sharing affords the states a double recovery.

However, drainage is only a single element of § 8(g) compensation. See *State of Texas*, 580 F.Supp. at 1221. It is entirely plausible that Congress simply believed that factoring out drainage from the 27% figure posed too much of an obstacle to the operation of a voluntary revenue sharing scheme."

In affirming the decision of the District Court, the Fifth Circuit Court of Appeals stated:

"The plain meaning and legislative history of section 8(g)(3) also do not support Louisiana's contention that the Secretary is compelled to enter a revenue sharing agreement. While the notification requirements of section 8(g)(3) are cast in mandatory language, the revenue sharing provision is clearly permissive. This language invests the Secretary with discretion to enter into agreements but does not require him to do so. The legislative history supports this interpretation."

Regarding the legislative history, the Fifth Circuit noted particularly the fact that during development of the new Section 8(g)(3), the House Interior and Insular Affairs Committee received a proposal from the State of Alaska which would have expressly enabled states to compel the Secretary to unitize common reservoirs; however, no Representative or Senator offered this draft as a bill or amendment to a bill.

Moreover, the Fifth Circuit found that Louisiana's construction of Section 8(g) was not supported by the Congressional purpose which animated the 1986 amendments, recognizing that the 1986 amendments were intended to permanently settle disputes over OCS revenues. The Fifth Circuit stated:

> "Congressional desire to eliminate litigation over OCS revenues is clearly reflected by the allocation to the states of 27 percent of all mineral revenues from federal lands, and by the abolition of the provisions requiring the negotiation of revenue sharing agreements and equitable dispositions by court decree of disputed revenues held in treasury escrow accounts. Louisiana's construction of section 8(g)(3) would emasculate this clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith."

It is a fundamental principle of law that in construing the meaning of a statute, a court must begin with the language of that statute. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed. 2d 82 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935, 44 L. Ed. 2d 539 (1975). Absent ambiguous language or a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Moreover, an interpretation that leads to absurd results which would thwart Congressional purposes is to be avoided. See Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S. Ct. 2053, 2061, 56 L. Ed. 2d 591 (1978). When a literal reading of a statute is consistent with its

Congressional purposes, no need to depart from the text exists. See *Barbee v. United States*, 392 F. 2d 532, 535 n. 4 (5th Cir. 1968), *cert. denied* 391 U.S. 935, 885 S. Ct. 1849, 20 L. Ed. 2d 855 (1968); *United States v. Campos-Serrano*, 404 U.S. 293, 298, 92 S.Ct. 471, 474-475, 30 L.Ed.2d 457 (1971). If the language of the statute is sufficiently clear in its context, it controls. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200-201, 214, 96 S.Ct. 1375, 1384-1385, 1391, 47 L.Ed.2d 668 (1976).

The decisions of the lower courts herein not only demonstrate careful analysis of the statutory context and legislative history of Section 8(g)(3), but also demonstrate faithful adherence to the foregoing canons of statutory interpretation recognized and/or affirmed by this Honorable Court.

Finally, the suggested conflict between the Fifth Circuit analysis in this litigation and the statutory analysis performed by the First Circuit Court of Appeals in *Commonwealth of Massachusetts v. Andrus*[16] and by the Tenth Circuit Court of Appeals in *Nevada Power Company v. Watt*[17] is non-existent. In *Andrus* the First Circuit interpreted the word "may" in Section 5(a)(1) of the OCSLA (prior to the 1978 amendments) as implying an underlying duty in the Secretary to exercise due diligence to exercise his regulatory authority under the act so as to avoid unreasonable risks to the fisheries in waters over the Outer Continental Shelf. In *Watt*, the Tenth Circuit interpreted the word "may" in Section 304(b) of the Federal Land Policy and Management Act as requiring consideration of the specified reasonableness factors in assessing reimbursement costs pertinent to applications for rights-of-way relating to public lands.

No conflict of statutory analysis is either apparent or inferred from the cited decisions. In both *Andrus* and *Watt*, the Circuit Courts of Appeal found in the legislative history support for their

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16 594 F. 2d 872 (1st Cir. 1979).

17 711 F. 2d 913 (10th Cir. 1983).

interpretation of the statutory language as excluding discretion. In the instant litigation both the District Court and the Fifth Circuit considered the legislative history and found that it did not support petitioners' contention that the Congressional use of "may" in Section 8(g)(3) imposes an affirmative duty upon the Secretary of the Interior to enter into a revenue sharing agreement with the affected coastal States. Moreover, both the District Court and the Fifth Circuit were able to glean Congressional intent from historical analysis of the pre-amendment structure of the statute in question, comparing the structure of Section 8(g)(3) as enacted in 1986 to the structure of the original 8(g) compensation scheme enacted under the 1978 amendments. While Congress expressly mandated both identification of potentially common areas and action by the Secretary to confect a revenue sharing agreement under the 1978 legislation, only notice of a common potentially hydrocarbon-bearing area and of the status of the federal tracts within the area was mandated under the 1986 legislation.

Indeed, the discretionary authority of the Secretary to effect revenue sharing agreements under the lower courts' construction of Section 8(g)(3) is consistent with the discretionary authority of the Secretary to exercise other powers vested in him under the OCSLA and/or Mineral Lands Leasing Act. See, for example, *Udall v. Tallman*, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965), cited by the First Circuit in *Andrus; Burglin v. Morton*, 527 F. 2d 486 (9th Cir. 1975), *cert. denied*, 425 U.S. 973, 96 S. Ct. 2171, 48 L. Ed. 2d 796 (1976); and *Watt v.Energy Action Educational Foundation*, supra; compare also *Ferry v. Udall*, 336 F. 2d 706 (9th Circ. 1964), *cert. denied* 381 U.S. 904, 85 S. Ct. 1449, 14 L. Ed. 2d 286 (1965). Moreover, a Congressional policy supporting the use of unitization to offset the effects of drainage across the federal-state OCS boundary would fly squarely in the face of the Congressional policy with regard to onshore federal lands evidenced in the Mineral Lands Leasing Act of 1920. At 30 U.S.C. § 226(g), a provision wholly

separate and distinct from the unitization authority of the Secretary at subpart (j) of this Act, Congress provided:

> "Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby." (Emphasis ours)

Of even greater significance, the unitization authority vested in the Secretary with respect to federal onshore lands under 30 U.S.C. § 226 (j) parallels the discretion left in the Secretary under the OCSLA with respect to federal OCS lands in that it delegates to the Secretary's discretion the power to approve, in order to promote conservation, unitization of federal lands and mineral leases. Note again, in this regard, the decision of the Tenth Circuit Court of Appeals in *Kirkpatrick Oil & Gas Co. v. United States*, supra.

Finally, if the permissive "may" within Section 8(g)(3) does not exclude an affirmative duty in the Secretary of the Interior to enter into revenue sharing agreements with the affected coastal Sates to offset drainage losses, then we must consider what meaning Congress intended to impart by its use of the permissive may in this statute.

One possibility suggested by petitioners is that the discretionary "may" refers only to the selection of the form of agreement to be used to accomplish the duty to protect the State resources from drainage. If this were so, then we must consider, as did the District Court below: If Congress had simply replaced "may" with "shall" there would exist the same grammatical import as to the choice between the kind of agreement but no suggestion of discretion in the Secretary to act. Why then did Congress not substitute the words if it intended to compel an agreement?

Another possibility suggested by petitioners in the courts below is that the discretionary "may" reflects Congressional uncertainty over its ability to compel the Governor of a coastal State to execute an agreement but does not supplant the alleged statutory obligation of

the Secretary to protect the State from drainage by entry into some form of agreement. In fact, petitioners have stated in brief in the lower court:

> "One may argue whether Congress can or has imposed a binding duty on the Governor of a sovereign state but it can clearly do so as to its own sovereign's executive officers."[18] (Emphasis added)

Recall too that the form of agreement which petitioners suggest Congress intends and expects based upon "historical arrangements" is an agreement unitizing the reservoirs. Any suspicion by Congress regarding its ability to compel the coastal States to join in unitization agreements would indeed be warranted. Louisiana Governor David C. Treen declared in 1983, in response to the unitization proposal of the MMS in this area prior to the federal lease sale, that "Louisiana has no legal authority to force its lessees to unitize across the state-federal boundary as you suggest." At the hearing on the preliminary injunction in the district court below, Bobby Jones, the State's authority on state-federal unitization agreements on the OCS, declared in response to an inquiry as to his knowledge of any unit between the two sovereigns in the 8(g) area that any governmental agency,either state or federal, has ever forced either party into:

> "That's voluntary unitization, no force pool. Nobody has authority to force pool out there."[19]

Given the Congressional rejection of a forced unitization proposal in 1986 and a joint leasing proposal in 1978 and against the backdrop of a legislative history clearly reflecting Congressional disfavor with any approach to the drainage issue that would impede federal offshore development or create the opportunity for litigation-related delay in that development, it is patently absurd to suggest that Congress intended [contrary to the clear and specific language of Section 8(g)(3)] to require the Secretary of the Interior as a statutory

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18 Original Brief of Appellants in the United States Court of Appeals for the Fifth Circuit at page 33.

19 Volume 11, Record at page 153.

duty to agree to unitize all common reservoirs with the affected coastal States aware of its inability to compel similar agreement by the States or their mineral lessees. A non-discretionary duty to unitize would compel the Secretary to acquiesce in the unitization demands of the coastal States in order to meet his alleged statutory obligation (and could jeopardize economic resources and policies of the nation in the face of inappropriate or unreasonable unitization demands of the states).

Drainage Compensation Under Section 8(g)(2)

The Fifth Circuit declined to address petitioners' contention that state revenues derived from Section 8(g)(2) do not include drainage compensation, finding that the plain meaning of Section 8(g)(3), as well as the legislative history and Congressional purpose behind that statute, excludes any "duty to unitize" in the Secretary in order to compensate these petitioners for their alleged drainage losses. Petitioners complain that the avoidance of this issue by the Fifth Circuit denies them opportunity to refute its judicial reasoning by failing to specify where drainage protection to the states is assured by Section 8(g); however, it was not incumbent upon the Fifth Circuit, as it is not incumbent upon any court, to address all issues raised by the litigant if the relief which he requests is legally foreclosed on other grounds. Petitioners complain of an alleged violation of a statutory duty under Section 8(g)(3) of the OCSLA and, as previously demonstrated, the Fifth Circuit has correctly found after careful statutory analysis that there is no such duty, affirming the judgment of the District Court that no violation of Section 8(g) of the OCSLA has occurred by the defendants in this litigation.

In opposing this petition for review, respondent will accordingly not examine the statutory analysis and legislative history (including the comments in debate of Senators Murkowski of Alaska, Evans of

Washington, Bentsen of Texas and others)[20] which confirm that the revenue sharing formula in Section 8(g)(2) of the 1986 amendments includes drainage compensation.

Statutory Consequences for Alleged Violations of Section 8(g)(3)

The comment of the Fifth Circuit in its analysis of Section 8(g)(3) that Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs but that no statutory consequences are provided in the event of failure either to agree or to attempt to agree, is wholly consistent with the statutory analysis of the District Court which recognized Section 8(g)(3) as preserving the Secretary's license to enter into <u>voluntary</u> agreements with the states when advantageous to federal interests when common reservoirs are present. Both the District Court and the Fifth Circuit held that although voluntary agreements are permitted, no duty either to agree or to attempt to agree exists in the Secretary under the language of the statute. Having thus found no statutory duty, it unquestionably follows that the enforcement provisions of Section 1349 of the OCSLA cannot be applied to compel the Secretary to enter into a revenue sharing agreement with the State of Louisiana under Section 8(g)(3) of the OCSLA in order to compensate Louisiana for its alleged drainage losses.

Congressional Intent to Eliminate Litigation Over the Sharing of OCS Revenues Under Section 8(g)

In the district court, Judge Duhe observed that the legislative history of the 1978 OCSLA amendments clearly indicates that Section 8(g) as enacted in 1978 was intended to address drainage concerns. Judge Parker in the *State of Texas* litigation observed further that a

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20 Congressional debate on the 1986 amendments appears at 131 Cong. Rec. S15423-S15439 (November 14, 1985).

consideration of the purposes behind Section 8(g)(4) as enacted in 1978 leads to the conclusion that a suit for a fair and equitable division of 8(g) lease revenues under the 1978 amendments was an exclusive remedy, a result deemed consistent with the Congressional purpose of alleviating litigation-related delay of OCS development.

Despite a legislative history and judicial pronouncements which recognize Section 8(g) revenue sharing (and not mandatory unitization) as the Congressional policy choice for addressing state claims for drainage losses, Louisiana has persisted in its refusal to accept the Congressional policy choice. In the district court in this litigation, counsel for the State of Louisiana continued to assert that Section 8(g) was not a drainage statute - that the fair and equitable share of revenues to be apportioned to the State under Section 8(g) was not related to drainage or to production.[21] Louisiana's counsel stated:

> "The State has never, never in the 8(g) urged that we were being drained from Block 18 or anywhere else along the coast, because the State's position has always been that that was not the basis for Section 8(g), that the 8(g) set a fair and equitable share of all revenues, that in fact drainage would be handled by unitization on a case by case basis as it always had been."[22]

This position was, of course, rejected by Judge Duhe, who remarked:

> "Although the State's complaint in the previous litigation did not specify a drainage claim, responses to interrogatories clearly indicate that the State contended that drainage was an element of its recovery under § 8(g). Louisiana also argued that former § 8(g) compensation encompassed drainage losses in an amicus curiae filing in the appeal of the *State of Texas* litigation." [Referring to *State of Texas v. Hodel*, 84-2422, 85-9072 (5th Cir. 1985)].[23]

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21 Volume 11, Record at page 57-58.

22 Volume 14, Record at page 36-37; Volume 4, Record at page 680.

23 See 656 F. Supp. 1310 at 1317.

In its brief to the Fifth Circuit Court of Appeals, Louisiana acknowledged that drainage was an element of the 1978 Section 8(g) calculation of a "fair and equitable" distribution of proceeds.[24]

Indeed, a legislative history evidencing rejection of the joint leasing proposal in 1978 and of the Alaska forced unitization proposal in 1986 clearly demonstrates that Congress preferred revenue sharing as the means of addressing the states' drainage concerns over any mandated joint state-federal action which might impede federal OCS development or lead to litigation-related delay of that development. This litigation, by which Louisiana seeks to compel unitization across the state-federal boundary and to restrict rates of production from federal wells consistent with that proportion of the recoverable reserves which these petitioners believe underlie the federal portion of the affected reservoirs pending such unitization is an example of that Congressional wisdom. Contrary to the assertions of these petitioners, this suit to require the Secretary to comply with an alleged "duty to unitize" is very much a dispute over OCS revenues and drainage compensation.

As recognized by the District Court, through Section 8(g) Congress evidenced a policy regarding the coastal States' remedy for resource drainage by federal lessees on the OCS - that remedy is limited to participation in Section 8(g)(2) revenue sharing. In finding no support in the legislative history or under the plain meaning of the statute for petitioners' alleged "duty to unitize" under Section 8(g)(3), the Fifth Circuit acknowledged that the states are assured of substantial compensation by the provisions of Section 8(g)(2). In seeking to establish a drainage remedy which inevitably will embroil the federal judiciary in a flood of litigation to resolve unitization disputes between the sovereigns and/or their respective lessees across the federal-state OCS border, petitioners must ask this Court to

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24 Original Brief of Appellants in the United States Court of Appeals for the Fifth Circuit at page 28.

to disregard the fundamental Congressional purpose which animated both the original development of the 8(g) drainage compensation plan and the revenue sharing formula developed under the 1986 amendments designed to end disputes over state entitlements to drainage compensation or drainage protection such as the one presently before this Court.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this litigation, as well as that of the District Court, reflects careful analysis of the legislation at issue in this litigation, its statutory context and the Congressional policies and objectives behind the legislation. The statutory interpretation by these courts is in complete accord with the canons of interpretation adopted and approved by this Honorable Court. In reaching their decisions, both of the lower courts considered the legislative history behind Section 8(g), including that which formed the basis for petitioners' arguments in this litigation. As previously demonstrated, no conflict of analysis is presented by the decision of the Fifth Circuit Court of Appeals in this litigation. In addition, both lower courts found that the record in this case provides no support for the claims of alleged waste in Samedan's operations which petitioners suggest might follow from a failure to unitize across the federal-state OCS border. Finally, the conclusion reached by these courts does nothing to upset existing state-federal relationships but leaves in place the legislative framework under which that historical relationship has always existed.

Congress addressed the drainage problem complained of by these petitioners in Section 8(g) of the OCSLA and wisely and deliberately limited the scope of the drainage remedy to revenue sharing by the states of federal lease revenues derived from the 8(g) zone, leaving to the Secretary of the Interior complete discretion to decide when and if unitization of potentially common reservoirs is appropriate for the proper development of federal OCS resources.

For the foregoing reasons, respondent Samedan Oil Corporation submits that the decision of the Fifth Circuit Court of Appeals in this litigation is correct, that there exists no conflict of decisions and that the questions raised by this petition do not merit review by this Honorable Court. Accordingly, respondent respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be denied.

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CERTIFICATE OF SERVICE

I, RANDALL C. SONGY, counsel of record for Samedan Oil Corporation, Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Brief in Opposition have been served on this 15th day of March, 1988 on each of the following, in each case by deposit of the copies to be served in a United States Post Office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

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It is hereby certified that all parties required to be served with the foregoing Brief in Opposition have been listed and served as of this 15th day of March, 1988 in the manner described hereinabove.

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